No. 43570-5

IN THE COURT OF APPEALS
STATE OF WASHINGTON

OLD CITY HALL, LLC, a Washington corporation,

Appellant,

v.

PIERCE COUNTY AIDS FOUNDATION, a Washington non-profit corporation; and PEGGY FRAYCHINEAUD GROSS, ATTORNEY AT LAW, a Washington sole proprietorship,

Respondents.

BRIEF OF RESPONDENT

PIERCE COUNTY AIDS FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court properly denied the landlord's motion for a continuance under CR 56(f) when it offered no good reason for delay in obtaining the desired evidence and the proffered evidence, even if it was obtained, would not have raised a genuine issue of material fact? (Assignment of Error 1)

2. Whether the trial court properly granted partial summary judgment in favor of the tenant where reasonable minds could not differ in finding that the overwhelming evidence of deficiencies in the leased premises, including problems with heating and air conditioning, threatened shut-off of utilities, inadequate security, transients living in the building, feces and garbage in the common areas, and restriction of access to the building over a prolonged period of time following repeated notice to the landlord and an opportunity to cure, resulted in a constructive eviction of PCAF as of December 30, 2009 as a matter of law? (Assignments of Error 2 and 3)

3. Whether the trial court properly granted summary judgment in finding that PCAF had not waived its claim of constructive eviction as a matter of law where the undisputed evidence revealed that although the tenant remained on the premises and continued to pay rent for two years, it repeatedly notified the landlord of numerous and recurring deficiencies,

provided ample opportunity to cure, and mitigated its damages until the premises became untenable by December 30, 2009 forcing the tenant to vacate? (Assignments of Error 4 and 5)

II. STATEMENT OF THE CASE

A. Facts related to Motion for Continuance under CR 56(f)

The landlord, Old City Hall, LLC (OCH), acquired the Old City Hall building in 2005. *CP 294.* At that time, Jeannie Darnielle was the Executive Director of the tenant, Pierce County AIDS Foundation (PCAF). *Id.* There is no evidence in the record of when she stopped serving as the Executive Director. Duane Wilkerson was hired as the Executive Director of PCAF in November 2007 *(CP 363)*, but there is no evidence whatsoever that he "succeeded Representative Darnielle." There is also no evidence that Ms. Darnielle served in this position "during 2005-2008." The appellant makes these unfounded assertions on page 3 of its brief without any citation to the record. In fact, the record is devoid of any evidence of the identities of or how many people held the position of Executive Director between Ms. Darnielle and Mr. Wilkerson. The only evidence whatsoever is that she was the Executive Director in 2005 when OCH acquired the building and that OCH approached her at least twice about buying out PCAF's lease to allow the developer to convert the building into office condominiums. *CP 294-295.*

PCAF claims that it was constructively evicted from the premises it leased from OCH by December 30, 2009: the date it vacated. *CP 369-370, 407.* Although there was a history of complaints, the conditions in the building became intolerable in 2009. *CP 295, 365-370.* The overwhelming evidence in the record describes in detail that the conditions became increasingly worse over time such that they reached a level of intolerability in 2009. *Id.* None of the facts contained in the thirteen declarations containing 433 pages of evidence submitted by PCAF were disputed or contested in any way. Not one affidavit or witness declaration was submitted by OCH to refute the facts relating to the condition of the premises in 2009. No objections were made to any of the materials submitted. The sole declaration filed by OCH was of its attorney, outlining the efforts that she made two years after the case was filed to take the deposition of the person who was the Executive Director of PCAF in 2005, four years before the claimed constructive eviction. *CP 714.*

B. Facts related to Partial Motion for Summary Judgment

PCAF had a written lease with OCH executed in 2002. *CP 9.* In 2005 OCH purchased the Old City Hall subject to the leases of the tenants therein, including the leases of the defendants. *CP 120, 295.* OCH sought to convert the building into office condominiums and attempted to prematurely terminate the leases in order to undertake the conversion. *CP*

120, 294. The two defendants named in this suit refused to terminate their leases early and OCH was unable to convert the building into condominiums. *CP 120-121, 295.* Following the failed attempt to convert the building, it fell into disrepair. *CP 122, 295.* OCH used Stratford Management Company[1] (hereinafter "Stratford") as its property manager and instructed the tenants to deal with Stratford as OCH's agent on all property related issues. *CP 364.* With only a few tenants, the janitorial service suffered *(CP 124, 297, 366)* and transients were allowed to take up residence in the building. *CP 130, 297, 365, 410.* Break-ins were frequent. *CP 130, 323, 369.* Bathrooms were not adequately maintained. *CP 122, 124, 297-298, 366.* The most critical problems, however, were the failure of the landlord to provide consistent heating and cooling in the building, its failure to timely pay its utility bills with the City of Tacoma resulting in repeated threatened discontinuation of services (electrical and water) to the tenants, including PCAF, and the failure to provide a safe and secure building for its tenants. *CP 131, 298, 323, 364, 409.* These minimum basic services that the landlord was required to provide under the lease were consistently not provided or threatened to be turned off.

[1] Stratford Management LLC is a Washington limited liability company which is ultimately controlled by George Webb and his wife in the same fashion as they own and control Old City Hall, LLC. *CP 514-522.*

1. Long History of Heating and Air Conditioning Problems

Air Systems Engineering, Inc. was hired to maintain the heating and air conditioning at Old City Hall for many years, including 2005 through 2009. *CP 213*. Although PCAF did not vacate until December of 2009, the agency had a long history of repeated HVAC problems because of the age of the equipment in the building. *Id.* In 2005, the owner of the building attempted to relocate all of the tenants so that the entire building could be renovated and made into condominiums. *CP 120, 294-295*. When that plan was frustrated, the owner failed to renovate and the aging equipment remained in the building. *CP 215-219*. In December of 2006 the PCAF space had no heat and the heating unit was reported as shaking violently. *CP 216, 252*. The technician from Air Systems Engineering noted that the unit was over 30 years old and recommended replacement of it. *CP 216, 253*. The normal life for this type of unit is only 19 years. *CP 219, 286-287*. The landlord elected to move an old unit from elsewhere in the Old City Hall (which most likely was also 30 years old) and place it in the PCAF space rather than install a new water source heat pump. *CP 217, 256*. Air Systems Engineering does not warrant the equipment when it is old and simply reinstalled in a different area of the building. *CP 219*. The specific history of the problems is as follows.

On May 22, 2007, Air Systems inspected the Old City Hall building space for PCAF because there was "No cooling." *CP 217, 264-265.* The technician reported that the unit in question was over 25 years old, in poor condition and that the "unit needs replacement." *CP 217-218, 264-265.* On June 5, 2007, Air Systems made a proposal to replace the unit with a used one from another location on site for $2,773. *CP 218, 266-268.* The work was not done. In December of 2007 Air Systems representatives met at the Old City Hall with OCH's property manager and PCAF about "comfort" heating issues. *CP 218, 270-272.* Air Systems updated previous proposals it had made for replacement of the HVAC equipment for OCH's review. *CP 218, 270-272.* By January 2008 the problem persisted and Air Systems sent a proposal to replace the unit for $8174. *CP 218, 277-279.* By May of 2008, Stratford had not repaired or replaced the HVAC equipment and Air Systems again submitted a bid in the alternative: replacement with new equipment for $8174 or repair with used 30 year old equipment located elsewhere in Old City Hall for the same $2,773 bid that had been given a year earlier. *CP 218, 280-282.*

On May 14, 2008, PCAF's Executive Director, Duane Wilkerson, notified OCH of the serious problems with the building, especially the air flow and the air conditioning that had been occurring and about which

they had complained for over 5 months. *CP 364, 372-373.* Finally on May 27, 2008, OCH's property manager, Mark Isner, authorized the repair option using 30 year old equipment. *CP 218, 283-284.* The work was done on June 9, 2008, years after the HVAC problem was initially reported. *CP 218.* Although Mr. Isner authorized the work to be done, OCH failed to pay Air Systems Engineering for any of the work done. *CP 219.* Not only did OCH fail to pay for that repair, it failed to pay for two other past due invoices resulting in a delinquent account of over $7,300 that has never been paid and was written off by Air Systems. *Id.* As a result of the non-payment, Air Systems refused to do any further work on the building. *Id.*

From 2006 through 2008, Ms. Fraychineaud-Gross experienced and complained about the heating and air conditioning issues at the building. *CP 123, 125, 132.* In the summer of 2008 the building was sweltering hot. *CP 132.* All of the plants on the second floor died. *CP 132-133.* The air conditioning was simply not working. *CP 132.* In the winter of 2006 the bathrooms on the second floor had no heat at all and were consistently reported to OCH as "freezing." *CP 124.* The carpets in the common areas were worn and stained with human feces, urine, and cigarettes. *CP 130.* The awnings on the exterior of the building were torn and there were broken windows in the building. *CP 127.* A dumpster was

stored right in front of the building. *Id.* During her tenancy, the building deteriorated from being beautiful to being a public disgrace. *CP 135.*

In the spring of 2009 the issue of air temperature and quality was still a concern and PCAF again reported the problems to the landlord. *CP 295, 366.* With Air Systems refusing to do any more work on the building, Temp Control Maintenance Service (TMCS), another HVAC company, was hired to perform repairs, but no maintenance, from April of 2009 to September of 2009. *CP 347.* In April 2009 TMCS changed filters in the HVAC system and covered an "access hole" because of a musty and moldy smell that made a PCAF worker sick. *CP 346.* The TMCS business records contain a notation that there had been a previous attempt to repair a leak on the water loop. *CP 346, 350-352.*

In May of 2009, David Morton of The Stratford Company met with Mr. Wilkerson to discuss the issues. *CP 366.* Mr. Wilkerson informed Mr. Morton that he believed that the conditions were so bad that PCAF would have to vacate its space. *Id.* Although initially Mr. Morton indicated that the owner would not "fight them" on it, it later turned out that the owner would not allow PCAF to vacate. *CP 366, 386-387.* Stratford blamed PCAF for "singlehandedly" preventing the redevelopment of the building, costing them millions. *Id.* Mr. Wilkerson responded, denying the allegations, explaining that the previous

negotiations with PCAF to vacate the facility in order to allow for the development of condos failed because no agreement could be reached about reimbursement for relocation costs, and reiterating his complaints about HVAC, safety and access issues to the ground level of building. *CP 366, 389.*

In spite of notices to the landlord, HVAC problems persisted. In June of 2009 TMCS responded to the Old City Hall because the air conditioning was down and there was no cooling in the PCAF space. *CP 346, 354-356.* The records reflect that the water loop temperature was at 95 degrees, the cooling tower was shut down, and the pump and heater "are in poor condition and cannot be used." *Id.* The technician reported that he was able to run the fan but that it only cooled the water loop down to the upper 70s. *Id.* Most notable on the record for June 26, 2009 is that the technician wrote in capital letters the following: "THE BUILDING NEEDS REPAIRS AND REGULAR MAINTENANCE ON THE HVAC EQUIPMENT." *Id.* An attorney for PCAF notified the landlord that the conditions amounted to constructive eviction and that the agency intended to relocate. *CP 366-367, 391-393.*

By July of 2009 it became clear that the air conditioning was still not working and the tenants in the building were complaining of unbearable heat. *CP 367, 409.* The conditions were so bad that PCAF

staff had to leave the building and work from their homes. *CP 295, 367.* In August 2009 TMCS was again called to the Old City Hall regarding the air conditioning unit in the PCAF space. *CP 347, 358-362.* TMCS technician, Andrew Wilcox, responded on September 8, 2009, over a week after the problem was reported. *Id.* The work order reveals that PCAF's AC unit was found to be low on refrigerant. *Id.* The technician diagnosed a leak but was unable to locate it. *Id.* The technician reported to Stratford Company that "The unit is cooling properly now but will be low again at some time in the future. The unit may need to be removed from the ceiling to safely find the leak." *Id.* Alfonso Melton, Stratford's agent, signed the work order with these notifications. *Id.* When TMCS invoiced Stratford on September 16, 2009 for the work performed on September 8th, the records reveal that Stratford objected to the price of the repairs and reported that the unit was "still not working." *Id.* TMCS did no further work at the Old City Hall.

The next company to tackle the failing equipment at the Old City Hall was Narrows Heating and Air Conditioning, which was hired to perform repairs, but no maintenance, from October of 2009 to November of 2009. *CP 330.* Although the company was not called to work on the HVAC system for PCAF, on October 30, 2009, it did provide a proposal to relocate another existing water source heat pump for use in Suite 205

(CP 330, 333-334) to be occupied by a new tenant. OCH again refused to replace the failing aged equipment and instead simply relocated an old pump elsewhere in the building for installation in a different space. The proposal made on October 30, 2009 was accepted *(Id.)* and the work performed and invoiced on November 11, 2009. *CP 330, 340.* There was no warranty provided on the relocated unit. *CP 330, 342.* Narrows was never paid for the work. *CP 330, 344.*

In November and December of 2009, the PCAF space was extremely cold. *CP 370.* PCAF again notified OCH of the failed HVAC system. *CP 370, 400.* In December of 2009, PCAF vacated the premises. *CP 370, 402-403.* One year after PCAF vacated the building, the Old City Hall was so cold that the sprinkler pipes froze and then burst causing serious damage and forcing all of the tenants in the building out. *CP 408.* The City's records reveal that the building was declared uninhabitable. *CP 501-506.* The disaster was headline news. *CP 538-544.*

2. Non-Payment of Utilities by the Landlord causes Threatened Disconnection by City

Notices were first posted in January of 2009 by the City of Tacoma Public Utilities informing the tenants that water and power to the building would be turned off as a result of the landlord's failure to pay its bill. *CP 296, 365, 410.* The lease required that the landlord provide and pay for

utilities. *CP 13*. The potential for the cut off of power and water threatened the very existence of a service business. *CP 365, 410*. The notices were consistently and regularly posted on the building through August of 2009. *CP 365, 375-382*. Each notice was a disruption to the business and required the Executive Director of PCAF to contact the City on nearly a daily basis to see whether the bill had been paid or the power was going to be turned off. *CP 365*. At one point he actually went to the City Public Utility office just to ensure that the power would not be shut off. *Id.* It was not uncommon for payment to be made to cure the delinquency on the last possible day. *CP 410*. By August of 2009, the fifth notice was posted on the building. The threat of no water or electrical, along with the HVAC issues, left the PCAF staff and other building tenants suffering in sweltering heat with no air conditioning and the possibility of no water or power. *CP 296, 365, 410*.

3. Failure to pay City of Tacoma Business License for years 2007 through 2011

Records from the City of Tacoma reveal that OCH repeatedly failed to pay its annual business license fees to the City in spite of repeated and consistent notices through those years. *CP 471-513*. OCH was clearly having severe financial troubles that explain why it was unable to meet its obligations under the leases with PCAF and other tenants.

4. Burglaries in the Building

In February 2008 there was a daylight robbery to South Bay Mortgage in Old City Hall. *CP 323, 431, 434-439.* The owner of South Bay reported more than one attempted break in to his space in the Old City Hall. *CP 323.* Peggy Fraychineaud-Gross also reported an attempted break-in in March of 2008. *CP 130.* Police records confirm the attempted break-ins and transients living in building. *CP 431-467.* In October of 2008 a glass entry door to the PCAF space was broken and the frame damaged without any entry being made. *CP 454-456.* It was an attempted burglary. *Id.* In November 2009 there was a burglary to PCAF with the loss of laptop computers and an LCD projector. *CP 369, 458-467.* Another tenant experienced a burglary in August of 2010. *CP 410.* The repeated attempts to burglarize the few rented spaces in the mostly vacant building posed serious safety and security concerns for the tenants and all of their employees.

5. Transients Living in the Building

As early as 2007 the high vacancy in the Old City Hall allowed for significant break-in attempts. *CP 130, 366.* By 2008 one tenant terminated its lease prematurely due to the poor conditions. *CP 323, 326.* Others complained to Stratford regarding the lack of security and maintenance. *CP 131, 296, 364.* Ms. Fraychineaud-Gross specifically

explained that she found a note posted that was advertising for sex; that she took pictures on 3/4/08; that the fire escape was pitch black; that she did not feel safe in the building; that she had experienced an attempted office break-in on more than one occasion; that the toilets were broken, the building was a place where drug deals were conducted, that she had encountered human feces on floor, broken windows, plywood over other windows and trash collecting in the common areas. *CP 130, 181-198.* Although Mr. Lough prematurely vacated the building prior to his lease term coming to an end *(CP 323, 326)*, those tenants who remained in the building repeatedly were frightened and/or surprised by people sleeping in the building overnight. *CP 133, 297, 366.* The safety and security of the tenants' employees and clients remained a significant concern and source of complaints. *CP 129, 366.* The situation became progressively worse and one tenant was fearful for her own safety by 2008. *CP 128, 133.* Throughout 2008 she had her husband walk her from her office suite to her car in order to ensure her safety. *CP 133.* Ms. Fraychineaud-Gross witnessed drug deals in the reception area of the building, trash and debris in the foyer, and transients sleeping in the building under the stairwell. *CP 131.* She observed and photographed garbage and human feces in the common areas of the building. *CP 130, 181-198.* Complaints were made to Stratford, the property manager for OCH. The landlord was clearly on

notice as early as October 2008 that the conditions in the building were considered by the few remaining tenants to constitute a constructive eviction. *CP 208-211.* They continued to deteriorate and transients continued to live in the building during 2009. *CP 365.*

6. City of Tacoma Notifies Landlord that Old City Hall is a Substandard Building

On December 7, 2009 the City of Tacoma inspected the Old City Hall and declared it to be in substandard condition. *CP 494-499.* The City's Notice contained specific documentation of the substandard condition. *Id.* The City's determination was based solely upon its inspection of the EXTERIOR of the building. *Id.* The condition of the interior of the building as described by Trina Jones, Marty Lough, Peggy Fraychinaud-Gross, Duane Wilkerson and Margie Abels and the condition of the HVAC equipment as described in the business records of Air Systems Engineering reveal a much more serious situation with the building. Nonetheless, simply based upon an exterior inspection, the City declared the building to be substandard.

7. Closure of Access on Commerce Street: PCAF's Main Address and Access for Clients

Because of the transients living in the building and the ongoing security concerns, the building property manager notified PCAF that it

intended to lock off the Commerce Street access to the building. *CP 298, 368*. This was a dramatic change to the space that PCAF had leased, especially in light of the address for its space being 625 Commerce Street. *CP 298-299, 369*. PCAF voiced its strenuous objection to yet another interference with its quiet enjoyment of the leased space. *CP 398*. PCAF clients regularly used the City buses to reach the agency. *CP 368-369*. All the busses traveled on Commerce where there is a transit center. *Id.* Many of the PCAF clients, who had health issues, could not navigate stairs or the steep hill from Commerce to Pacific Avenue. *Id.* They needed to access the building on Commerce and ride the elevator down one floor to the PCAF suite. *Id.* Shutting off the Commerce Street access meant that PCAF would continue to have a Commerce Street address but no access from that street and that it would still have to have employees go up to the Commerce Street mail room to pick up mail, a place that was not secure and had the potential for transients to be present. *CP 299, 368*. In addition, the parking lot that serviced the building was on Commerce Street directly across from the locked main entrance. *CP 129*. The issue of closing the doors on Commerce was the quintessential straw that broke the camel's back and forced PCAF to give notice of its intention to vacate the building based on a constructive eviction. *CP 298, 368*. This was not news for OCH as it had received repeated notices of the conditions that its

tenants felt constituted constructive eviction justifying vacation of the leased space.

8. Notices of Intent to Vacate

In the spring of 2008, Marty Lough gave notice of intent to vacate based upon the deplorable conditions in the building. *CP 323.* By October of 2008, Defendant Peggy Fraychineaud-Gross notified the landlord that she believed that the conditions in the building resulted in her constructive eviction. *CP 134, 208-211.* By summer of 2009, PCAF continued to suffer with HVAC problems. *CP 296, 367.* The failure of the air conditioning resulted in sweltering conditions for the tenants. *CP 295, 367, 409.* Break-ins continued. *CP 433-467.* Garbage was piling up in the common area outside of the PCAF interior entrance. *CP 297-298, 366.* Transients continued to be found sleeping and/or living inside the building. *CP 297, 365.* Access to the inside of the building from the outside remained without repair for three months. *CP 366, 389.* Repeated notices threatening the termination of utilities continued to be posted on the building. *CP 296, 365.* Real estate taxes were unpaid for the second half of 2008 and all of 2009. *CP 524-536.*[2] Finally, the Commerce Street

[2] In fact, taxes remained unpaid and a foreclosure action was commenced on February 14, 2011 by Union Bank under Pierce County Cause No. 11-2-06429-3, because the OCH owed the bank over $3,410,000. The bank sought to place the Old City Hall in receivership.

entrance, which was identified as the address for PCAF, was completely locked from the public. *CP 369, 400.* PCAF repeatedly notified OCH of these problems and of its intent to vacate in May 2009, June 2009, and November 2009. *CP 369, 386-396.* Even after giving the notice, the problems with no heat continued into the very cold months of November and December of 2009 and OCH continued to be notified of the issue. *CP 370, 405.* Having placed OCH's property management company, the entity to whom they were directed to communicate on all tenant related issues, on notice of the constructive eviction, PCAF took the extraordinarily precautionary measure of filing suit to have a Court determine that the conditions that they believed had become intolerable did amount to a constructive eviction as a matter of law. *CP 367.* PCAF believed that it had obtained a default judgment finding that it had indeed been constructively evicted. *CP 369.* The Board of Directors then authorized the execution of a new lease for an alternative space. *Id.*

9. Old City Hall declared in derelict condition by City of Tacoma.

In November of 2010, as a result of bursting sprinkler pipes that had frozen during the winter, the Old City Hall made headlines with a flood that forced the remaining few tenants from the building. *CP 408, 538-544.* On December 14, 2010, the City declared the building to be in

"derelict condition" and posted signs on the building that read "MUST NOT BE OCCUPIED." *CP 501-513.* In addition, the City placed a utility restraint on the building. *Id.* In spite of the fact that by December of 2010 the building could no longer be occupied by ANY tenants, OCH continues to seek unpaid rent from PCAF through November of 2012!

III. ARGUMENT

A. The trial court properly denied the landlord's motion for a continuance under CR 56(f) when it offered no good reason for delay in obtaining the desired evidence and the proffered evidence, even if it was obtained, would not have raised a genuine issue of material fact.

A trial court can properly deny a motion for continuance if: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. Denial of a continuance can be based on any one of the above three prongs. *Pelton v. Tri–State Mem'l Hosp., Inc., 66 Wash.App. 350, 356, 831 P.2d 1147 (1992).* A trial court's decision on a request to continue the summary judgment is reviewed for abuse of discretion. *Colwell v. Holy Family Hosp., 104 Wash.App. 606, 615, 15 P.3d 210 (2001).*

A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Anfinson v. FedEx Ground Package Sys., Inc., 174*

Wash. 2d 851, 860, 281 P.3d 289, 294 (2012). Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Jankelson v. Cisel, 3 Wash. App. 139, 142, 473 P.2d 202, 205 (1970).* A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Fowler v. Johnson, 167 Wash. App. 596, 604, 273 P.3d 1042, 1047 (2012).*

1. The Landlord offers no good reason for the delay in scheduling the deposition.

This suit was filed nearly three years ago on February 3, 2010. *CP 1.* The lease attached to OCH's complaint contains Jeannie Darnielle's signature. *CP 23.* She is a well-known public figure, having represented the residents of the 27th Legislative District in the Washington State House of Representatives since 2001. *CP 738.* The case was continued once, thereby extending the discovery period longer than normal. *Id.* Yet, OCH waited two years to decide to take the deposition of the former

Executive Director who signed the lease and specifically negotiated with OCH's owner, George Webb, when he tried to prematurely terminate the lease and force PCAF out of the building to allow for a complete overhaul of the Old City Hall into condominiums. *CP 294-295, 679-700, 738.* OCH, since the commencement of the case, knew of this witness and her knowledge, but failed to do anything to secure any testimony whatsoever from her for over two years.

When counsel for OCH finally decided to schedule the deposition, she did so for January 24, 2012 and sent out notices of oral examination to opposing counsel. *CP 662, fnt.1.* Counsel for OCH did not, however, serve the witness with a subpoena to compel her attendance and the she summarily cancelled her own deposition. *Id.* Ms. Darnielle's deposition was rescheduled for April 10, 2012 *(CP 700)*, over two years after suit was filed, but the landlord has submitted no evidence explaining why it waited two years to properly schedule the deposition.

2. The Landlord has not stated what evidence would be established through the additional discovery.

The landlord alleged that the deposition of Ms. Darnielle was necessary to "explore the circumstances of PCAF's tenancy for the previous two years," meaning 2005 and 2006. *CP 663.* It seeks to "ask the decision-maker at PCAF during 2005-2007 about its choice to remain

on the Premises despite its frequent complaints and the possibility of alternative space." *Id.*

The record contains no evidence whatsoever that Ms. Darnielle was the Executive Director of PCAF in 2006 or 2007. The only evidence is that Ms. Darnielle was the Executive Director in 2005 and that Mr. Wilkerson was hired as the Executive Director in November of 2007. Thus, the record reflects that Ms. Darnielle's knowledge, at most, relates to 2005. It is undisputed that during all of the time about which the landlord seeks to inquire, it collected rent payments every month. *CP 753.* Regardless of whether there were complaints about the condition of the premises, the tenant had a right to remain on the leased premises and expect the landlord to honor its obligations as long as it paid rent. It continued to pay rent throughout the lease term. *Id.* While it is true that PCAF has alleged that years of neglect resulted in its constructive eviction as of late 2009, that simply means that the landlord failed to do anything to maintain the building such that ultimately the conditions deteriorated to an unbearable and intolerable level. The undisputed facts reveal deterioration over time that caused a constructive eviction. The landlord has not stated what evidence Ms. Darnielle would have that would bear on the conditions that forced PCAF to vacate the premises and cease paying rent at the end of 2009. Her knowledge would be limited to the condition

of the premises as of 2005, over 4 years before PCAF vacated the premises claiming constructive eviction.

3. Testimony from a witness who has no relevant knowledge of the period of the constructive eviction will not create a genuine issue of material fact.

a. The witness had no knowledge that would have created an issue of fact regarding whether or not there was a constructive eviction in 2009.

The question of whether there was a constructive eviction must depend on the conditions as they existed just prior to vacation of the premises by the tenant. *Erickson v. Elliott, 177 Wash. 229, 232, 31 P.2d 506 (1934).* Thus, in this case, the relevant period of inquiry is 2009, not 2005 when Ms. Darnielle was the Executive Director of PCAF.

OCH sued PCAF for breach of lease claiming entitlement to all of the future rents due following PCAF's vacation of the premises in December of 2009. *CP 1-7.* PCAF defended claiming no rent was due because it was constructively evicted. *CP 68-78.* OCH has submitted no evidence whatsoever to contradict the overwhelming evidence of the condition of the Old City Hall in the fall and winter of 2009. Consequently, the conditions that are described in the declarations and the business and public records submitted by PCAF are undisputed. That evidence reveals that the conditions in the leased premises had so deteriorated by 2009 that PCAF was constructively evicted therefrom and

the landlord breached the terms of its lease as a matter of law, both with respect to its duty to repair under the lease and with respect to the covenant of quiet enjoyment.

The proffered witness, Ms. Darnielle, has no knowledge whatsoever regarding the condition of the building in 2008 or 2009. She was the Executive Director when the lease was signed in 2002 *(CP 23-24)* and thereafter when OCH's owner, George Webb, acquired the building in 2005 and attempted to prematurely terminate PCAF's lease and force it out. *CP 294*. Mr. Wilkerson has been the Executive Director since November 2007. *CP 363*. At the time that Ms. Darnielle was Executive Director, PCAF had an enforceable 10-year lease. *CP 9-32*. It had no legal obligation to terminate it or to move elsewhere. It was completely within its rights to remain on the leased premises regardless of any offers made by the landlord to cut the lease term short. As long as PCAF paid rent and honored the terms of its lease, OCH (as the new owner of the building and successor in interest to the lease) assumed all of the obligations thereunder. No agreement was reached regarding a voluntary premature termination. *CP 295*. PCAF continued to timely pay rent throughout the lease term and did so through October 2009. *CP 753-758*. These facts are undisputed.

Because Ms. Darnielle has no knowledge regarding the undisputed facts regarding the condition of the building from 2007 to 2009, any information that she might give regarding the condition of the building when OCH first acquired it in 2005 or the negotiations related to an early termination of the lease would not raise an issue of fact that would preclude partial summary judgment on the issue of the constructive eviction. Therefore, a continuance for her deposition was properly denied. In *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, AFL-CIO, Local 1001, 77 Wn. App. 33, 49, 888 P.2d 1196, 1206-07 (1995)*, a suit for defamation, the Court refused to grant a continuance where *Ernst* argued that it needed further discovery to identify the individuals who discussed and published the mailer because the information purportedly would have assisted in determining whether the Union knew that the defamatory statements were false. *Id.* The court reasoned that since actual malice was not an issue raised on summary judgment, what the defendants actually knew was irrelevant for purposes of deciding the motion. *Id.* See also *Stranberg v. Lasz, 115 Wn. App. 396, 406, 63 P.3d 809, 814 (2003) (citing Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474, (1989)* (continuance denied where additional testimony concerning the reciprocal wills would not raise a genuine issue of fact); *Thongchoom v. Graco Children's Products, Inc., 117 Wn. App. 299, 308-*

09, 71 P.3d 214, 220 (2003) (continuance denied because the proffered evidence was nothing more than the plaintiffs understanding of the information they were seeking from the defendants. They had no knowledge that any of the information would be favorable to their case.) In the absence of sufficient justification, a continuance may be denied and summary judgment granted. *Idahosa v. King County, 113 Wn. App. 930, 55 P.3d 657 (2002)* (continuance denied); *Colwell v. Holy Family Hospital, 104 Wn. App. 606, 15 P.3d 210 (2001)* (continuance denied); *Janda v. Brier Realty, 97 Wn. App. 45, 984 P.2d 412 (1999)* (continuance denied); *Molsness v. City of Walla Walla, 84 Wn. App. 393, 928 P.2d 1108 (1996)* (continuance denied).

b. The witness had no knowledge that would have created an issue of fact regarding whether the affirmative defense of constructive eviction was waived.

OCH speculated that Ms. Darnielle might have knowledge regarding whether PCAF waived its right to assert the affirmative defense of constructive eviction when it refused to move out and prematurely terminate its lease in 2005. The condition of the building at that time or any time prior to 2007 is irrelevant. PCAF continued to pay rent each and every month from 2005 to October of 2009 *(CP 753-758)* and looked to the landlord to honor its duties, covenants and obligations under the lease. OCH seems to argue that PCAF should have claimed a constructive

eviction in 2005 or 2006, stopped paying rent, and moved out years earlier in order to preserve its claim of constructive eviction for deplorable conditions that came to exist by 2008 and 2009. Apparently, the argument is that by not moving out at the first sign of disrepair, PCAF has forever waived its right to claim a constructive eviction no matter how bad the conditions become. Washington law, however, is to the contrary.

Where the landlord fails to rectify the conditions that constitute a constructive eviction after being given a reasonable opportunity to cure **and the tenant continues to insist that the conditions be corrected while paying rent**, the affirmative defense is **not** waived. *Aro Glass & Upholstery Co. v. Munson-Smith Motors, Inc., 12 Wn. App. 6, 10-11, 528 P.2d 502, 505-06 (1974).* Ms. Darnielle's testimony regarding the condition of the building during her stewardship in 2005 has no bearing on the issue of whether a constructive eviction that occurred in 2009 was waived.

The decision of the trial court to deny a continuance to take Ms. Darnielle's deposition was supported by the record and was not outside the range of acceptable choices. The undisputed and overwhelming facts of deplorable conditions in the building in 2008 and 2009 would not be affected by the testimony of a witness whose knowledge was admittedly confined to her tenure from 2002 to 2005.

Even if she did have knowledge for the years 2006 or 2007, that time period was also clearly irrelevant. The trial court did not abuse its discretion in denying the motion for a continuance under CR 56(f).

B. Reasonable minds cannot differ in finding that the landlord breached its duties under the lease and constructively evicted the Pierce County AIDS Foundation when it failed to provide consistent heating and air conditioning, secure premises, janitorial service and repeatedly failed to make timely utilities payments resulting in several threatened disconnections by the City.

The Court of Appeals reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court, considering all facts in the record and reasonable inferences in a light most favorable to the nonmoving party. *MRC Receivables Corp. v. Zion, 152 Wash. App. 625, 629, 218 P.3d 621, 623 (2009).* Summary judgment is required where the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c); Parry v. Windermere Real Estate/East, Inc., 102 Wn. App. 920. 924, 10 P.3d 506 (2000).* A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. *CR 56; Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963); Zedrick v. Kosenski, 62 Wn.2d 50, 380 P.2d 870 (1963).* A motion for summary judgment should be granted if there is no genuine issue of material fact or

if reasonable minds could reach only one conclusion on that issue based upon the evidence construed in the light most favorable to the nonmoving party. *Sea-Pac Co. v. United Food & Comm'l Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985); Ford v. Red Lion Inns, 67 Wash. App. 766, 769, 840 P.2d 198, 200 (1992); Brutsche v. City of Kent, 164 Wash. 2d 664, 678, 193 P.3d 110, 118 (2008); Basin Paving Co. v. Mike M. Johnson, Inc., 107 Wash. App. 61, 68, 27 P.3d 609, 612 (2001).* The burden is on the nonmoving party to make out a prima facie case concerning an essential element of the claim if the moving party first shows that there is an absence of evidence to support the nonmoving party's case. *Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989);* see also *Hash v. Children's Orthopedic Hosp., 110 Wn.2d 912, 915, 757 P.2d 507 (1988); Weatherbee v. Gustafson, 64 Wn. App. 128, 131 (1992).*

The facts in this case reveal that the landlord purchased the Old City Hall to completely reconstruct them into condominium units. When some of the tenants refused to move from the building and voluntarily terminate their leases, the plan was abandoned and the property began to see serious deterioration. Tenants moved out and were not replaced. The vacancy remained high such that by 2008 there were only 2 or 3 tenants in the entire building. Burglaries occurred regularly and transients were

found living or sleeping in the building. The HVAC system was in serious need of replacement, but instead of replacing the equipment, the landlord elected to use the "band aid" approach and move old unused equipment from other spaces in the building to spaces where units had failed and there was either no heat or no cooling. The equipment that was relocated within the building and re-used was NOT warranted by those who did the work and was not maintained because of non-payment. The landlord was consistently warned about the very serious age of the HVAC equipment and the likelihood of its failure. The maintenance company consistently recommended and gave estimates for replacement that were ignored.

By August of 2009 a maintenance technician replaced refrigerant in the equipment to get it to work temporarily, but put the landlord on notice that the coolant would run low again and the equipment would fail. Not surprisingly, when autumn of 2009 arrived, temperatures in the building cooled. But when winter approached, the frigid temperatures within the building revealed that indeed whatever temporary fix was purportedly made in the summer was insufficient to keep the equipment operating to provide heat.

The landlord continued to fail to pay its utility bills and property taxes. Janitorial services were poor and bids for cleaning were repeatedly ignored. Trash piled up in the hallways outside the PCAF suite in bags.

Fines for failure to pay its annual business license accumulated without any payment. Real property taxes went unpaid. The City of Tacoma found the exterior condition of the building to be substandard as of December 2009. One year later the City declared it to be a derelict building.

The few remaining tenants found transients living in the building and garbage and waste in the vacant spaces and common areas. Burglaries occurred repeatedly from 2007 through 2009. Security of the tenants and their employees and customers was an overwhelming concern.

The overwhelming undisputed evidence reveals that the landlord owner of the building was financially unable or unwilling to comply with the lease terms that require it to provide all utilities (electrical and water), adequate janitorial/cleaning services, and consistent heating, ventilation and air conditioning services such as would make the premises tenantable. *CP 13*. Further, the lease required that the landlord maintain the common areas of the building in good order, condition and repair. *Id.*

A landlord's breach of a covenant in a lease, causing the property to become no longer fit for the purposes intended, is a substantial interference and grounds for constructive eviction. *Aro Glass & Upholstery Co. v. Munson-Smith Motors, Inc., 12 Wash. App. 6, 10, 528 P.2d 502, 505 (1974) A* constructive eviction takes place if the landlord

does any wrongful act or is guilty of any neglect or default whereby the premises are rendered unsafe, unfit, or unsuitable for occupancy for the purpose for which they were leased; but there can be no constructive eviction unless the landlord is at fault. *Erickson v. Elliott, 177 Wash. 229, 232, 31 P.2d 506, 507 (1934).* When the premises subject to a lease are no longer fit for the purposes intended, the resultant constructive eviction releases the tenant from any further liability to pay rent, provided he abandons the premises to the lessor. *Id. at 11.* The overwhelming evidence reveals the continual deterioration of the Old City Hall with increasing vacancy where even the basic provisions required under the lease for heat, ventilation and air conditioning were not maintained. The age of the HVAC equipment in the building required replacement but the landlord could not afford what was necessary and opted instead for temporary makeshift repairs that came with no warranty and which, by virtue of the testimony of the tenants, repeatedly failed to address the very serious problems. The landlord's failures resulted in constructive eviction.

C. The complete closure of the main entrance of the building denied PCAF a means of access that was essential to the substantial enjoyment of the premises and constitutes a constructive eviction.

If the failed HVAC were not enough, PCAF was faced with safety and security issues and the City's repeated threatened termination of utility service. Although service was not lost, the repeated threat over a period of

8 months amounted to an interference with the quiet enjoyment of the premises leased. To deprive a tenant of rights guaranteed by his lease contract is to disturb the substantial enjoyment of the tenure and to deprive a tenant of a means of access essential to the substantial enjoyment of the use of the premises is such a disturbance of his quiet enjoyment as to entitle him to damages and in a proper case to injunctive relief. *Income Properties Inv. Corp. v. Trefethen, 155 Wash. 493, 508-09, 284 P. 782, 787 (1930).* In all tenancies, there is an implied covenant of quiet enjoyment of the leased premises. The covenant of quiet enjoyment secures the tenant from any wrongful act by the lessor which impairs the character and value of the leased premises or otherwise interferes with the tenant's quiet and peaceable use and enjoyment thereof. *613 Fairview Ave., L.L.C. v. Pong's Corp., Inc., 115 Wash. App. 1012 (2003).*

The landlord, in an attempt to address security issues, unilaterally closed the main access to the building on Commerce Street, which was the physical address of the leased premises described in PCAF's lease. The landlord deprived the tenant and its clients, volunteers and board members from access to the premises on Commerce Street. This interference with the use of the premises also constitutes a constructive eviction. The rule of law has been stated as follows:

> It is a well-established rule that actual force is not necessary to effect an eviction in law, but that any **interference by the landlord with the full and substantial enjoyment by the tenant of the thing leased amounts to an eviction**. In *Hoeveler v. Fleming, 91 Pa. 322*, the court, observed: 'The modern doctrine as to what constitutes an eviction is that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law.' In *Edmison v. Lowry (S. D.) 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774*, the following instruction was approved: 'As to the matter of eviction, it is not necessary there should be any act of a permanent character, but any act which has the effect of depriving a tenant of the free enjoyment of the premises, or any part thereof, or any appurtenances pertaining to these premises, must be treated as an eviction; and I charge you that any act of the plaintiffs which has deprived defendant of the enjoyment of the free right pertaining to and belonging to him as tenant may be treated as an eviction.'

Wusthoff v. Schwartz, 32 Wash. 337, 340-41, 73 P. 407, 408 (1903) (Emphasis added).

By locking the doors and denying access to the Commerce Street entrance, the street named in the lease as the physical address of premises leased by PCAF, it was deprived of the free enjoyment of a part of the premises that it leased. The entrance on Commerce, the common area accessed from Commerce and the elevator down to the PCAF suite were granted under the lease. The landlord's unilateral decision to completely eliminate this access constituted a constructive eviction. The landlord proceeded with this course of action even after objection from PCAF. It

refused to change its position and the Commerce Street doors remained locked making access for disabled clients a particular hardship.

D. The affirmative defense of waiver was not raised in OCH's Reply and therefore has been waived.

Waiver is an affirmative defense and must be pleaded. CR 8(c). OCH did not plead waiver in its Reply to PCAF's Counterclaim asserting a constructive eviction. In general, if such defenses are not affirmatively pleaded, they are deemed to have been waived and may not thereafter be considered as triable issues in the case. *Farmers Ins. Co. of Washington v. Miller, 87 Wash. 2d 70, 76, 549 P.2d 9, 12-13 (1976).* Even if the affirmative defense can be raised, the party asserting waiver bears the burden of proving it. *14 U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc., 104 Wash. App. 823, 831, 16 P.3d 1278, 1282 (2001).* In light of that burden and the overwhelming undisputed evidence the affirmative defense of waiver fails as a matter of law.

E. Reasonable minds could not differ in finding that there has been no waiver of the affirmative defense of constructive eviction or the claim that the landlord has breached its lease where the undisputed facts reveal that PCAF consistently paid rent throughout the lease term, registered complaints about conditions in the building, obtained repeated assurances from the landlord of repair and ultimately, when conditions deteriorated to the point that they were untenable, declared a constructive eviction and vacated the premises.

When reviewing summary judgment, the Appellate Court engages in the same inquiry as the trial court and reviews the evidence de novo. *Fischer-McReynolds v. Quasim, 101 Wn. App. 801, 807, 6 P.3d 30 (2000).* If the moving party sustains the initial burden of showing that the case involves no genuine issue of material fact, the burden then shifts to the nonmoving party to show that the case does indeed involve a genuine issue of material fact. *Id. at 808.* A material fact is one upon which the litigation depends. *Id.* If the nonmoving party cannot demonstrate that factual issues exist, summary judgment will be granted. *Id.* The nonmoving party cannot simply rely on the pleadings, but must come forward with evidence outside the pleadings that contradicts the evidence submitted by the moving party, or in some other way demonstrates the existence of an issue to be determined by the trier of fact. *White v. State, 131 Wn. 2d 1, 9, 929 P2d 396 (1997).* The non-moving party may not rely on speculation or argumentative assertions that factual issues remain. *Pain Diagnostics and Rehabilitation Associates P.S. v. Brockman, 97 Wn. App. 691, 697, 988 P2d 972 (1999).* Where there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts become immaterial and the moving party is entitled to judgment as a matter of law. *Fischer-McReynolds, supra at 808.* In the context of leases, the Court granted summary judgment on behalf of a

tenant where the landlord claimed that the tenant had breached a lease by removing valuable permanent fixtures and installations from the property without his consent. *Neiffer v. Flaming, 17 Wn. App. 440, 442-43, 563 P.2d 1298, 1299-300 (1977).* In *Neiffer*, the tenant filed an affidavit controverting the landlord's assertion, acknowledging that he had moved and stored on the premises both a portable irrigation system and several hundred feet of fence. *Id.* The Court granted summary judgment for the tenant dismissing the action for waste because after the landlord's assertion was refuted and specific facts were set forth in the tenant's responding affidavit, the landlord failed to set forth any specific facts that would support his allegations of waste. *Id.*

In the case at bar, PCAF has set forth uncontroverted evidence of a constructive eviction and breach of material terms of the lease. The only issue attempted to be raised by the landlord here is that the tenant has waived its right to assert that affirmative defense and breach. A "waiver" is the intentional and voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. *Edmonson v. Popchoi, 155 Wash. App. 376, 389-90, 228 P.3d 780, 787-88 (2010) review granted, 170 Wash. 2d 1001, 243 P.3d 551 (2010) and aff'd, 172 Wash. 2d 272, 256 P.3d 1223 (2011).* Intent cannot be inferred from doubtful or ambiguous factors. *White Pass Co. v. St. John, 71 Wash.2d*

156, 163, 427 P.2d 398 (1967). If a waiver is not found by express agreement, a waiver by conduct occurs only if the actions of the person against whom waiver is claimed are inconsistent with any intention other than waiver. *Edmonson, supra at 390. Wagner v. Wagner, 95 Wash. 2d 94, 102, 621 P.2d 1279, 1284 (1980).* There is no evidence or claim of an express waiver. Thus, OCH relies upon implied waiver based upon conduct.

In this case, however, the undisputed evidence reveals that PCAF's actions in paying rent each month, repeatedly notifying its landlord of problems, and giving it an opportunity to cure them were not inconsistent with any intent other than to waive the warranty. Such actions were completely consistent with honoring the lease and holding the landlord to its obligations thereunder, waiting until the conditions were completely intolerable to stop paying rent and then moving out. Of particular note is the fact that the undisputed evidence revealed an increasing number of conditions over time. While there were consistently heating and A/C issues over the years, periodic repairs resulted in temporary improvements to the situation. *CP 296, 364.* By 2008, however, issues that had not been present in the building before arose which made the conditions overwhelming: feces in the common areas; transients living in vacant spaces that had not been vacant in 2005; and several burglaries. *CP 130,*

323. By 2009 additional brand new serious problems with the premises combined with the HVAC and security issues to render the premises untenantable: threatened shut off of power and water by municipal authorities; determination by the City that the building was in substandard condition; nonpayment of real property taxes and the total closure of all access to the premises from Commerce Street. *CP 364.* The undisputed evidence is that the property had HVAC issues early on that the landlord attempted to fix, but those issues continued and serious other different defects and deficiencies arose in 2008 and 2009, such the accumulation of these very serious conditions by October of 2009 constituted a constructive eviction as a matter of law.

Where the landlord fails to rectify the conditions that constitute a constructive eviction after being given a reasonable opportunity to **cure and the tenant continues to insist that the conditions be corrected while paying rent, the affirmative defense is not waived**. In *Aro Glass & Upholstery Co. v. Munson-Smith Motors, Inc., 12 Wn. App. 6, 10-11, 528 P.2d 502, 505-06 (1974)* the court explained waiver in this context as follows:

> Finally, Aro contends that Munson-Smith waived any claim of eviction by continuing to occupy the premises and by continuing to pay the rent after the first request to correct the puddling. In an action for payment of delinquent rent, the lessee's right to assert constructive eviction as an

> affirmative defense may be waived when the tenant asserts either (1) a deficiency which the landlord has had no opportunity to rectify, *Pague v. Petroleum Products, Inc., 77 Wash.2d 219, 461 P.2d 317 (1969)*; or (2) a deficiency which the tenant has knowingly relinquished. In the case at bench, the landlord had ample opportunity to correct the situation and indeed, made several ***unsatisfactory attempts*** to correct the situation. Clearly, also, Munson-Smith ***continually pursued its requests and demands that corrective action be taken. Under that state of the facts the lessee cannot be said to have waived the right to assert constructive eviction as a defense to the action for rent.*** *(Emphasis added)*

In *Aro*, the Court found that the tenant had been constructively evicted when the landlord failed to repair the parking lot of the premises to prevent puddling after repeated complaints and attempts to cure were unsuccessful during a two and one half year period. In the case at bar, the following facts are undisputed and reveal that there has been no waiver as a matter of law:

1. PCAF paid all rent through October 2009. *CP 754.*

2. PCAF repeatedly notified its landlord of the increasing number of problems with the leased premises in 2008 and 2009. *CP 294-321, 363-407.*

3. On May 14, 2008 PCAF notified its landlord of specific HVAC and security issues repeatedly raised but which had not been cured. *CP 364.*

4. June 9, 2008 records reflect landlord refused to replace HVAC equipment as recommended and instead relocated used equipment to address the complaints. *CP 218-219, 275-289.*

5. Conditions failed to improve and continued to deteriorate following attempted repair. *CP 294-321, 363-407.*

6. June 3, 2009 PCAF notified its landlord of the specific conditions in the building that continued and/or had arisen (HVAC, security, janitorial and delinquent utility payments) and that such conditions constituted a constructive eviction. *CP 366-367.*

7. August 13, 2009 PCAF commenced suit against The Stratford Company, LLC, believing it to be the landlord, claiming breach of lease and constructive eviction. *CP 367.*

8. Mr. Webb, an owner of The Stratford Company, LLC and of Old City Hall, LLC, received and was aware of the lawsuit wherein PCAF claimed it was constructively evicted and that the landlord had breached its lease. *CP 750-752.*

9. September 4, 2009 PCAF obtained Default Judgment declaring it was constructively evicted and had no further obligation to pay rent. *CP 369.*

10. On November 12, 2009 PCAF notified its landlord that it was vacating the premises. *CP 369-370.*

Based upon these undisputed facts, there has been no waiver as a matter of law. PCAF continued to pay rent up until it had a judgment[3] determining it no longer had any obligation to pay. Even after the

[3] Unfortunately, the Judgment was against the wrong defendant: The Stratford Company, LLC, which was the property manager, not the owner/Landlord. Although the Judgment was later vacated PCAF believed it was valid and Mr. Webb, a member in both The Stratford Company LLC and Old City Hall, LLC, was well aware of the constructive eviction claimed by this tenant. *CP 747-752.*

judgment was entered, it paid rent for October while it prepared to vacate. Because of delays in tenant improvements to its new space, PCAF actually vacated the Old City Hall in December 2009. *CP 369.* PCAF continued to demand that repairs to the premises be made, security issues be addressed and utility payments be made timely. In November of 2009, while they were preparing to vacate, the agency was burglarized and computers were stolen. *Id.* PCAF vacated within a reasonable time of claiming that it was constructively evicted and raised the issue affirmatively in a lawsuit (albeit against the wrong defendant) months before the landlord commenced this suit for rent due under the lease. The undisputed facts reveal that the landlord had ample opportunity to correct the situation and indeed, made several unsatisfactory attempts to correct it, and PCAF continually pursued its requests and demands that corrective action be taken. Consequently, as the Court held in *Aro, supra*, there was no waiver of the right to assert that a constructive eviction occurred.

The authority cited by OCH is of no value. OCH relies upon out-of-state cases of no precedential authority. PCAF had every right to insist upon being able to stay in the premises for the full 10-year lease term. Refusing to prematurely terminate the lease and relocate did not give the landlord the right to neglect the building and ignore its obligations under the lease. Its argument to this court is that the tenant should have claimed

constructive eviction many years ago at the time it wanted to force them out. It argues that PCAF should have vacated then and not continued to pay rent. But that is exactly what the landlord wanted. This landlord wanted the tenant to leave and it appears that if the tenant did not leave voluntarily, it would be forced out based upon a constructive eviction. Having successfully breached its obligations under the lease and allowed the premises to deteriorate to an untenable condition, it now argues that the tenant waited too long, acted too slowly and should have cried "eviction" and moved out years earlier. Having failed to do so and continued to timely pay its rent, the landlord suggests that PCAF has forever "waived" its right to assert a constructive eviction no matter how much worse the situation became. As in the *Aro* case, the undisputed facts reveal that PCAF continued to pay rent and insist that the deficiencies be corrected until an overwhelming number of issues combined to result in a constructive eviction that they did not waive. When reasonable minds could reach but one conclusion from the evidence presented, the question of whether there has been a waiver may be determined as a matter of law, and summary judgment is appropriate. *Cent. Washington Bank v. Mendelson-Zeller, Inc., 113 Wash. 2d 346, 353, 779 P.2d 697, 700-01 (1989); Davis v. Niagara Mach. Co., 90 Wash.2d 342, 348, 581 P.2d 1344 (1978); Meissner v. Simpson Timber Co., 69 Wash.2d 949, 951, 421 P.2d*

674 (1966). In this case the trial court properly determined that reasonable minds could not differ in finding that PCAF had not waived the claim of constructive eviction.

IV. PCAF IS ENTITLED TO AN AWARD OF ATTORNEY FEES INCURRED IN THIS APPEAL

Pursuant to RAP 18.1, PCAF requests an award of attorney fees and costs incurred in this appeal. Grounds for obtaining attorney fees at trial will support an award on appeal. *Landberg v. Carlson, 108 Wn. App. 749, 758, 33 P.3d 406 (2001).* Fees may be awarded as part of the cost of litigation when there is a contract, statute, or recognized ground in equity for awarding such fees. *Thompson v. Lennox, 151 Wash. App. 479, 491, 212 P.3d 597, 603 (2009).* A contractual provision for an award of attorney's fees at trial supports an award of attorney's fees on appeal under RAP 18.1. *Id.* In this case, paragraph 27 of the lease provides that the prevailing party is entitled to recover attorneys' fees in any action between the parties, declaratory or otherwise. *CP 19.*

PCAF's attorneys provided representation in this case on a *pro bono* basis. Washington has rejected the position that attorney fee awards should not be granted for *pro bono* representation. See *Blair v. Washington State University, 108 Wn.2d 558, 570, 740 P2d 1379 (1987); Fahn v. Civil Service Comm'n, 95 Wn.2d 679, 685, 628 P.2d 813 (1981).*

Indeed, it is an abuse of discretion even to reduce an award of attorney's fee because of the *pro bono* nature of the representation. *Blair, 108 Wn.2d at 571.*

Pro bono representation is a basis to deny attorney fee awards only where a statute specifically precludes fees for *pro bono* attorneys. *Council House, Inc. v. Hawk, 136 Wn. App. 153, 160, 147 P.3d 1305 (2006).* ("[U]nless a statute expressly prohibits fee awards to pro bono attorneys, the fact that representation is pro bono is never justification for denial of fees.") For example, the Court identified RCW 59.18.250, which provides for an award of attorney's fees in unlawful landlord retaliation claims, except that "neither party may recover attorney's fees to the extent that their legal services are provided at no cost to them." *Id. at 160, n.15* (citing RCW 59.18.250). Absent such a provision, the court held that the "[f]act that [a party's] attorneys represented her pro bono is irrelevant. If the court denied fees on that basis, its decision was untenable." *Id. at 160.*

Here, the fact that PCAF's counsel agreed to take its case on a *pro bono* basis should not preclude the Court from awarding reasonable fees under RCW 4.84.185. See *Fahn, 95 Wn2d at 685; Council House, 136 Wn. App. at 160.* An award of reasonable fees is proper by the express terms the lease drafted by the landlord and PCAF's *pro bono* representation can have no bearing on whether it should be awarded its

attorney's fees to the prevailing party in accordance with its terms. This Court should uphold the award of attorney's fees to PCAF by the trial count and award fees its fees on appeal as well.

This Court cannot award attorneys' fees to OCH on appeal regardless of the outcome because the appellant failed to devote a section of its opening brief to the issue of fees. RAP 18.1 requires that a party devote a section of its **opening** brief to the request for the fees or expenses. This requirement is mandatory. *Dep't of Labor & Indus. of State v. Kaiser Aluminum & Chem. Corp., 111 Wash. App. 771, 788, 48 P.3d 324, 333 (2002).* A request for attorneys' fees made for the first time in a Reply brief is not to be considered. *In re Marriage of Mull, 61 Wash. App. 715, 724, 812 P.2d 125, 130 (1991).*

V. CONCLUSION

The trial court did not abuse its discretion in denying the landlord's Motion for Continuance under CR 56(f) because there was an unreasonable delay in taking the deposition of Ms. Darnielle and because her testimony cannot create a genuine issue of material fact that would preclude summary judgment. The trial court's order granting PCAF's motion for partial summary judgment on the issue of OCH's breach of lease and constructive eviction should be upheld because the undisputed facts reveal that OCH is guilty of neglect or default whereby the premises

were rendered unsafe, unfit, or unsuitable for occupancy for the purpose for which they were leased as a matter of law. Reasonable minds could not differ in so finding based upon the overwhelming undisputed evidence submitted by PCAF.

DATED this 3rd day of December, 2012.

Respectfully submitted,
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By _____
Attorneys for Respondent
Pierce County AIDS Foundation

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of Morton McGoldrick, P.S.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

On December 3, 2012, I served in the manner noted the document(s) entitled: Brief of Respondent Pierce County AIDS Foundation on the following person(s):

Michael Ray Garner Theresa Hsin-Yi Wang Stokes Lawrence PS 800 Fifth Ave., Ste. 4000 Seattle, WA 98104-3179	[ ] U.S. Mail [ ] Facsimile [ ] Messenger [X] E-Mail
Richard W. Wooster Mann Johnson Wooster & McLaughlin 1901 S. I Street Tacoma, WA 98405	[ ] U.S. Mail [ ] Facsimile [ ] Messenger [X] E-Mail

DATED this 3rd day of December, 2012, at Tacoma, Washington.

MORTON McGOLDRICK, P.S.

Terri L. Bricker

Terri L. Bricker, Legal Assistant